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675142—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 579

870 SEVENTH AVENUE CORPORATION, DOING BUSINESS AS THE PARK CENTRAL, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 113–120) is not reported. The findings of fact and conclusions of law appear at pages 123–133 of the Record. The opinion of the Circuit Court of Appeals (R. 138–145) is reported in 150 F. (2d) 819.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 3, 1945 (R. 145). The petition for a writ of certiorari was filed on No-

vember 3, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATIONS INVOLVED

Section 205 (a) of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 640; 50 U. S. C. App., Supp. IV, 925 (a)) reads as follows:

> (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Restaurant Maximum Price Regulation No. 2–1 (8 F. R. 10436, 12445, 15450) is set forth in the Appendix to Petitioner's Brief at pages 33 to 51.[1]

[1] Restaurant Maximum Price Regulation No. 2 (9 F. R. 7263) had superseded Restaurant M. P. R. No. 2–1 at the time the judgment was entered by the district court. R. M. P. R. No. 2, issued by the Administrator primarily for the purpose of achieving nationwide uniformity in restaurant price control, contains all of the substantial provisions of R. M. P. R. No. 2–1 that are material to the case at bar. The Administrator's Statement of Considerations for the issuance of R. M. P. R. No. 2 are set forth in the Appendix to Petitioner's Brief at pages 28 to 32.

STATEMENT

Petitioner owns and operates the Park Central Hotel in New York City and maintains therein five separate restaurants, one of which is called the Hawaiian Room. Prior to and between April 4 and April 10, 1943, and subsequent thereto, petitioner rented certain suites in its hotel under Budget Plan leases which entitled the tenants to the occupancy of their respective suites, and in addition thereto, dinner nightly in the Hawaiian Room, laundry services not exceeding $2.50 per week for each person, and valet services consisting of the pressing of not more than three suits or dresses for each person in one week (R. 126). Between October 1, 1942, and November 1, 1943, tenants were billed a flat sum each month without indication of the various amounts allocated to rental, meals, and other services, but such allocation was made on the petitioner's books (R. 128–129). The dinners in the Hawaiian Room were served from a menu which carried no prices after the food items (R. 125–126). In a typical case of a total monthly charge of $150, $90 was allocated to rent, $21.66 to laundry for two persons, and $38.34 to meals and valet services (R. 129). During the same period petitioner made a charge of $1.50 for each meal taken in the Hawaiian Room by a guest of a Budget Plan tenant (R. 126).

Under date of July 19, 1943, the Regional Price Administrator of Region II, acting under the pro-

visions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 640; 50 U. S. C. App., Supp. IV, 901–946) and under a general order of the Price Administrator, issued Restaurant Maximum Price Regulation No. 2–1, effective July 26, 1943, and applicable to the states of New York, New Jersey, Pennsylvania, Delaware, and Maryland, and to the District of Columbia. Section 1 of that regulation provided that a restaurant or hotel owner "must not offer or sell" any meal or food item at a price higher than the maximum price established in either Section 2 or 3 thereof. Section 2 provided that "your maximum price for any food item or meal * * * is the highest price at which you offered the same food item or meal" during the seven-day period April 4–10, 1943.

On or about June 2, 1943, and at various times thereafter, petitioner renewed various Budget Plan leases at rentals higher than those previously charged. Typical cases of increases on the various suites were as follows (R. 15):

(a) two-room unfurnished suites occupied by one person were increased from $125 to $150 per month;

(b) two-room unfurnished suites occupied by two persons were increased from $150 to $185 per month;

(c) two-room unfurnished suites occupied by three persons were increased from $175 to $220 per month.

Petitioner concedes that these increases were for meals served by it in the Hawaiian Room (Pet. p. 3).

Subsequent to November, 1943, when the O. P. A. Rent Regulations became effective, the additional amounts charged under the renewed leases were allocated to meals, laundry, and valet service on the bills submitted to the tenants by petitioner (R. 129–130).

After a conference on January 17, 1944, between representatives of the petitioner and representatives of the Office of Price Administration, the petitioner was advised that the increases in the prices of meals served in the Hawaiian Room constituted violations of M. P. R. No. 2–1, and was requested to reduce them to the amounts charged during the base period established by that regulation (R. 17). The petitioner having failed to reduce its prices, the Price Administrator instituted this suit in the United States District Court for the Southern District of New York under the provisions of Section 205 (a) of the Emergency Price Control Act, *supra,* to enjoin the petitioner from continuing to violate that Act and the regulation issued thereunder (R. 3–5). The district court concluded that petitioner's price increases were violations of the regulation, but withheld issuance of the injunction for thirty days to give petitioner an opportunity to cease the violations and to make proper adjustments with its

tenants (R. 113–120). Subsequently, the district court permanently enjoined the petitioner from selling or delivering food for immediate consumption to the Budget Plan tenants at prices in excess of the maximum prices provided for by Restaurant Maximum Price Regulation No. 2–1, as amended, unless the petitioner should stipulate its intention to abide by the court's determination, and should within thirty days make adjustments with its tenants for the excessive amounts theretofore collected by it (R. 121). On appeal the circuit court of appeals affirmed the judgment of the district court with respect to the violations in the Hawaiian Room[2] (R. 138–143).

QUESTION PRESENTED

Whether petitioner violated the applicable maximum price regulation in increasing the amount charged its Budget Plan tenants for meals in the Hawaiian Room over the prices which it

[2] The Administrator also brought suit to enjoin violations in petitioner's four other restaurants. The District Court thought an injunction was unnecessary as to these restaurants and dismissed the complaint. The circuit court of appeals, upon appeal by the Administrator from this portion of the judgment, reversed and remanded the proceedings with instructions to grant an injunction or to enter an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief should violations occur (R. 144–145). Petitioner seeks no review of this portion of the order of the circuit court of appeals, and this branch of the case is not involved in the petition (Pet. p. 3).

charged these tenants during the period from April 4 to April 11, 1943.

ARGUMENT

I

Section 1 of Restaurant M. P. R. No. 2–1 provided that a restaurant or hotel owner "must not offer or sell" any meal or food item at a price higher than the maximum price. Section 2 of that regulation provided that the maximum price for any food item or meal should be the highest price at which the same food item or meal was "offered" during the base period, April 4–10, 1943.

Petitioner contends that it made no "offer" within the meaning of the regulation during the week of April 4–10, 1943 with respect to meals served to Budget Plan tenants in the Hawaiian Room, but that the offer to those tenants was made several months prior to the base period when the tenants entered into their respective leases.[3]

It is not only unrealistic to argue that meals prepared, served, and consumed during the period

[3] The district court did not, as petitioner states in its brief at page 21, "explicitly" or otherwise find that petitioner did not in April 4–10, 1943, *offer meals* in the Hawaiian Room to its Budget Plan tenants at the prices fixed by the 1942 leases. The court found only that "All of the Budget Plan leases in effect during the base period had been made many months prior to April 1, 1943, and none [of the leases] was offered or entered into during the base period" (R. 132, Finding of Fact XXXI).

April 4–10, 1943, were offered at a previous time when the leases were made, but the contention also appears to be inconsistent with the intention of the Congress as plainly stated in Section 4 (a) of the Emergency Price Control Act (56 Stat. 23; 50 U. S. C. App., Supp. IV, 904 (a). That Section provides that "it shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver a commodity, * * * in violation of any regulation or order * * * or to offer, solicit, attempt, or agree to do any of the foregoing." Petitioner endeavors to support its contention by pointing out that Section 1 of the regulation contains the words "offer to sell," whereas Section 2 of the regulation uses only the word "offered." The use of the term "offered" was merely responsive to the special needs and conditions prevailing in the restaurant trade. Most business firms are in a position to prove actual selling prices during a base period by means of bills and invoices. Restaurants, however, find it easier to rely on the offering price shown in their menus used during the base period. Hence, the regulation involved was drafted so as to permit restaurant owners to refer to offering prices during the base period, while persons in other kinds of business, subject to the General Maximum Price Regulation (the general "freeze" regulation), were per-

mitted to use their offering prices only in the event that they had not made an actual delivery of the commodity during the base period. It was the purpose of Restaurant M. P. R. No. 2–1 to freeze all current and future prices at the levels which prevailed during the base period. In the light of the above considerations, it is plain that the administrator had no intention of creating any distinction such as is drawn by the petitioner from the omission of the word "sell" from Section 2 of the regulation. Thus, Section 2 must be read in conjunction with Section 1 and not in contradistinction to it. Section 1 prohibits the offer or sale of any food item at a price higher than the maximum price computed according to "directions" contained in Sections 2 or 3. The direction in Section 2 is express that the restaurant must figure maximum prices for meals at the highest price "at which" they were "offered" in the base period; not at the highest price at which a contract to provide such meals was entered into. As was well stated by the circuit court of appeals:

> * * * the fact that the price for the meals offered was fixed several months before is irrelevant. That price, just as the rate of rental received pursuant to a lease entered into some months before the Rent Regulations became effective, did not depend upon the time when the contract to provide meals at that price was entered

> into. Section MPR No. 2–1 fixed price ceilings at the highest prices actually established during the week of April 4–10, 1943, regardless of whether these prices were established by prior contract or otherwise. (R. 140.)

Petitioner further argues that the interpretation placed on the regulation by the court below is discriminatory and results in hardship to it, in that it deprives petitioner of the benefits of the increases in prices which occurred prior to April 1943. On this point, the petitioner relies upon the Price Administrator's Statement of Considerations which accompanied Restaurant M. P. R. No. 2 (Pet. App., pp. 28–32) to show that the Administrator did not intend the regulation to deprive any restaurant owner of the benefits of the increases in prices which occurred prior to April 1943. The Statement of Considerations declares also, that data and information collected by the Regional and District offices "have convinced the Administrator of the need for a uniform national regulation based upon the maximum prices charged for meals, food items, and beverages during the base period of April 4–10, 1943 * * *," and that "The accompanying Regulation * * * is primarily a regulation which freezes the maximum prices of eating and drinking places in the 48 states * * * to the April 4–10, 1943 levels" (Pet. App., p. 30).

We submit that it was the broad purpose of the Administrator in adopting the regulation to fix the maximum prices for meals at the April 4–10, 1943, levels, regardless of existing leases or contracts in particular cases.

If the regulation worked a substantial hardship on petitioner, it had ample opportunity to file a protest under Section 19 of the regulation, and then obtain judicial review by appeal to the Emergency Court of Appeals under Section 204 of the Act should the protest be denied. *Yakus v. United States,* 321 U. S. 414; *Bowles* v. *Seminole Rock and Sand Co.,* No. 914, October Term, 1944, decided June 4, 1945. Questions involving the equity and fairness of price schedules are matters placed exclusively within the jurisdiction of the Emergency Court of Appeals. *Bowles* v. *Nu Way Laundry Co.,* 144 F. (2d) 741 (C. C. A. 10th), certiorari denied, 323 U. S. 791. Thus, the court below was correct in declining to grant the petitioner relief from the hardship of the regulation[4] (R. 141).

[4] In any event, even if petitioner's assertion were adopted that the tenants' meals were not "offered" during the base period, the maximum price for the meals served to them should have been determined in accordance with the procedure set forth in Section 3 (b) of the Regulation, which provides for the calculation of maximum prices for those food items or meals which were not offered during the base period or the four weeks preceding it. Since petitioner evidently did not use that method of calculation, it was in violation no matter how its conduct is viewed.

II

Petitioner next contends that the price, $1.50, which it charged for each meal served in the Hawaiian Room to the guests of its Budget Plan tenants, became the ceiling price for meals served to the Budget Plan tenants themselves, and that there was, therefore, no violation, because the increased prices charged to the tenants did not exceed the $1.50 rates charged for the guest meals. Both the district court (R. 118) and the circuit court of appeals (R. 142) rejected this contention, holding that to sustain it would contravene Section 9 (2) of the regulation, which defined the practices that would be regarded as evasions of the regulation to include:

> (2) Withdrawing the offer, or increasing the price of any meal ticket, weekly rate, or other arrangement by which customers may buy food items or meals at less than the prices they must pay when purchasing by item or meal.

The circuit court of appeals also expressed the opinion that the regulation "was intended to fix the price of food to that at which it was sold under the same arrangements during the critical period" (R. 142). This view is manifestly sound. It is true, of course, that the regulation contains a classified list of food items, while it does not expressly designate classes of customers. This, however, does not overcome the language con-

tained in Section 9 (2) which provides that increasing the price of any "meal ticket [or] weekly rate" shall be regarded as an evasion of the regulation. This language, used in the particular setting, makes it plain that the regulation recognized that there were different classes of restaurant customers, and that the maximum prices established by the regulation should be fixed in accordance with the respective categories. Classifications of this kind in connection with price control regulations are essential in order to effectuate the purposes of the Emergency Price Control Act. Cf. *Bowles* v. *Nu Way Laundry Co., supra,* and *Rainbow Dyeing & Cleaning Co., Inc.,* 150 F. (2d) 273 (App. D. C.). Consequently, the regulation here involved must have been designed by the Administrator to enable restaurant customers to continue to obtain equivalent meals at the same prices paid by them under the same circumstances during the base period. To reach a contrary conclusion would require the court to indulge in the presumption that the Administrator, when adopting the regulation, did not intend to prevent substantial increases in the cost of living such as are involved here, although the prevention of inflation was the primary purpose of the Act which he was administering.

Considered in the light of the broad purposes of the Emergency Price Control Act and the substantial price increases which occurred in this

case, the construction placed on the regulation by the courts below is, we submit, reasonable and proper.

CONCLUSION

The decision of the court below is clearly correct, and there are no conflicts of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN R. BENNEY,
Attorney, Department of Justice.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

MILTON KLEIN,
Director, Litigation Division.

DAVID LONDON,
Chief, Appellate Branch.

NATHAN SIEGEL,
Special Appellate Attorney,
Office of Price Administraton.

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